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No. 80-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAYO OIL COMPANY AND THE MEADVILLE CORPORATION AND PETROLEUM MARKETING CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILBUR D. PRESTON, JR.,
Counsel of Record

NEVETT STEELE, JR.
GERSON B. MEHLMAN
WHITEFORD, TAYLOR, PRESTON, TRIMBLE & JOHNSTON
2000 First Maryland Building
25 South Charles Street
Baltimore, Maryland 21201
(301) 752-0987
Counsel for Kayo Oil Company

SEYMOUR KURLAND
BARRY F. SCHWARTZ
WOLF, BLOCK, SCHORR & SOLIS-COHEN
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102
(215) 569-4000
Counsel for Meadville Corporation

DAVID F. ALBRIGHT
SEMMES, BOWEN & SEMMES
10 Light Street
Baltimore, Maryland 21202
(301) 539-5040
Counsel for Petroleum Marketing Corporation

The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

		PAGE
I.	Pre-Indictment Delay	1
II.	Petitioner Were Not Informed of the Nature and Cause of the Accusation	4

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I.

PRE-INDICTMENT DELAY

Petitioners have petitioned the Court to issue a writ of certiorari because of the government's inexcusable pre-indictment delay of approximately eight years after the time it received the Teak tape, the government's chief trial exhibit. Nothing contained in the government's opposition to certiorari changes the undisputed facts that 1) petitioners were forced to present a defense to events that occurred over eight years prior to the indictment, even though some

of the persons involved in those events and some of the records concerning those events were lost to petitioners due to the long passage of time; and 2) petitioners were unable to question or cross examine the speaker on the tape, Mr. Teak, because he had died prior to the government even beginning its investigation. The government's inexcusable delay should have caused the trial judge to dismiss the indictment, but at the very least the delay should have prevented the government from introducing the Teak tape into evidence.

The government contends that there are two reasons why the Court should not review this issue.[1] First, the government maintains that the delay was justified because the government attorney to whom the tape was delivered "apparently" never listened to the tape. The government's support for this statement is the trial court's finding in its opinion. This finding, however, was made before the newspaper reporter who delivered the tape to the government testified at trial that he had played portions of the tape for the government attorney and had called the attorney approximately one year after delivery to determine if anything had been done as a result of the tape.[2] Thus, contrary to the government's assertion in its brief that it had no notice of any allegedly illegal activity until 1973, the record below is undisputed that the government had knowledge of the contents of the Teak tape in 1969, but waited until almost eight years later to seek an indictment.

Second, the government argues that the petitioners were not prejudiced by the delay. This contention is astounding

[1] Although the government comments on the manner in which this issue was raised in the Fourth Circuit, it is undisputed that the issue was raised. *See Government's Brief* at 3n.6.

[2] After this evidence was admitted, petitioners renewed their motion to dismiss the indictment in their motion for judgment of acquittal.

given the fact that the government prosecutor played the Teak tape repeatedly during the trial of this case and during his closing argument. Further, the jury requested to hear the tape during its deliberations. Thus, the Teak tape was used by the government as its chief trial exhibit to prove a conspiracy, and the jury evidently accepted it as such. Yet, petitioners were unable to cross examine the speaker of the tape to refute any statements he made or to clarify them because Teak had died over three years after the tape was delivered to the government, but over four years before the indictment. If the government had moved with any dispatch at all, petitioners would have been able to exercise their sixth amendment rights and cross examine the witnesses against them. At the very least, this prejudice should have led the trial court to exclude the Teak tape. In addition, the government's failure to act upon receiving the tape resulted in several other aspects of prejudice which are in the petition filed by petitioners at 19-21, which should have led to the indictment being dismissed.[3]

[3] At page 5 note 7 of its brief, the government adopts the trial court's findings that petitioners were not prejudiced because the record of Teak's activities were "amply preserved" because the petitioners could have called the person with whom Teak communicated. This assumes that petitioners knew all the persons with whom Teak communicated. Moreover, this does not begin to solve the prejudice visited upon the petitioners due to the inability to examine Teak concerning the remarks on the tape. With regard to the other witnesses who died during the interim period, the government contends that the petitioners were not prejudiced because there was no showing that their testimony would not have been cumulative. The point is, however, that due to the government's delay, petitioners cannot say what these individuals would have testified to concerning the alleged conspiracy. Finally, the government adopts the district court's disbelief that documents were destroyed by petitioners after eight years. Irrespective of their disbelief, the fact remains that documents were destroyed through normal procedures concerning events that played prominently during the trial.

Finally, the government contends that even if the tape had been heard by government attorneys upon delivery, petitioners' characterization of the tape as containing incoherent and ambiguous statements deprives them of the right to complain about the government not acting upon the tape. The point is, however, that at trial the government took the position that the ambiguous remarks on the tape were prima facie evidence of a conspiracy. The petitioners could not call the speaker of these remarks to refute the government's interpretation because of the inordinate delay. The government cannot have it both ways — at one point arguing that the remarks evidenced a conspiracy, but changing its position to disclaim any responsibility for the delay because the remarks are ambiguous.

II.

PETITIONERS WERE NOT INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION

As noted in their petition, petitioners were informed prior to trial that the nature and cause of the accusation against them of price fixing were area-wide price changes at petitioners' stations throughout the Middle Atlantic States ["MAS"] area. During the second half of the trial, however, the prosecutor shifted his case to present evidence concerning nineteen (19) incidents of price changes in localized markets within the Middle Atlantic States. As petitioners were never informed that these incidents were the nature and cause of the accusation of price fixing, they were surprised at trial and unprepared to defend properly against this evidence.

What is remarkable here is that when petitioners requested time before trial to prepare to meet evidence of local price changes, the government prosecutor *opposed this request,* stating:

> [Y]ou cannot look at a Sherman Act conspiracy in isolation by dissecting and dismembering each little

> part . . . [I]f we start this dissecting and isolating of every price in every station, throughout every market area with the Mid-Atlantic States, this trial will never come to an end.
>
> * * * * * *
>
> It's not the fixing of a particular price at a particular time, or to bring about a particular increase. The activities, as they are described in the indictment, are maintaining price levels and sometimes achieving/bringing about restoration.
>
> Now, Defense counsel know from examining the testimony of all the witnesses that appeared before the Grand Jury, including the people from their own companies — and they have had this testimony since August, the bulk of the Grand Jury testimony. And it shows clearly that on the market restoration, the wide area of restoration, the independents were following the majors.

J. App. at 15, 180-82.[4] Although the government attempts to persuade the Court in its opposition brief that these words failed to constitute an iron clad guarantee that the government's case would not revolve around local price changes, a review of this statement in the procedural context in which it was given establishes that the petitioners were told before trial not to concern themselves with preparing to defend against isolated price changes in localized markets within the MAS.

Given the prosecutor's statement that misled the petitioners, the government's argument is without any basis

[4] Later, the petitioners requested particulars concerning what the government claimed showed the existence of a conspiracy. The prosecutor stated that:

> Our response to the claim by the corporate defendants. And simply the character and nature of the evidence simply prohibits the type of itemization that they seek . . . I submit that the evidence simply does not make possible the itemization they ask for. . . .

Hearing of April 15, 1977 at 90.

that various materials in petitioners' possession before trial informed them that local price moves would be the subject of the trial. Even assuming that the prosecutor had given the petitioners a list of the 19 incidents discussed at trial, it would have been meaningless once the prosecutor promised that the incidents would have nothing to do with the trial.

Moreover, even ignoring the prosecutor's pretrial assurances, the government's contention that the materials in the petitioners' possession satisfied the sixth amendment's guarantee to be informed of the nature and cause of the accusation is absurd. First, although the government cites the indictment and bill of particulars as giving petitioners notice, neither of these documents in any manner mention the localized price changes or even obliquely refer to them. Petitioners requested such information in their request for particulars, but were told by the government that such information did not exist. *See* note 4, *supra*.[5]

[5] Moreover, petitioners received no benefit from the information relayed by the government in the bill of particulars. The district court in its order of February 9, 1977 ruled that the government must furnish information as to the duration of each defendant's and each unindicted co-conspirator's participation in the alleged conspiracy, giving dates of joining and withdrawal as to those defendants and unindicted co-conspirators who were not alleged to have participated throughout the entire period of time covered by the indictment. The government was also directed to identify and describe, including the names of other persons involved, the act by which each defendant and unindicted co-conspirator first participated in the alleged conspiracy or conspiracies. The court modified the defendants' request by requiring only approximate dates and those names presently known to the government. None of the information furnished was to preclude the government from further modification, addition or deletion thereof at trial.

The defendants received little, if any, benefit from the government's response to the first request. The government stated in its bill of particulars that it could not identify the individual act by which each individual defendant and unindicted co-conspirator first participated in the alleged conspiracy. The government's attempt at describing the acts was merely a

The government also points to the fact that the petitioners had before trial the grand jury testimony, documents turned over by third parties and the government's intended trial exhibits, and contends that these informed the petitioners of the nature and cause of the charge. These materials, however, were voluminous, comprising a mountain of paper. The grand jury testimony consisted of sixty-eight volumes totaling over 4500 pages. Most of the testimony was vague and inconclusive, covering the witnesses' general experiences, and contained little or no precision as to specific matters or events in the MAS.

The documents volunteered by and subpoenaed from non-defendants and other third parties that defendants were permitted to inspect at the Justice Department were contained in 166 boxes. Ray. S. Bolze, counsel for Ashland, indicated to the trial judge that it took a team of paralegals a month just to index the third party documents. It took several weeks to then analyze these documents relating to only three one-month periods in the City of Baltimore. Mr. Bolze further estimated that it would require six weeks for the team of paralegals to analyze the prices in only six cities for a one month period, and that it would literally take years to analyze the entire Mid-Atlantic area for the entire time period designated in the indictment.

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repetition of the same general language used in the indictment, ". . . exchanged and discussed information concerning current and future gasoline prices and related market intelligence for the purpose of co-ordinating price increases and restorations, eliminating discounts, settling pricing disputes and securing continued adherence to agreed upon increased prices."

The government stated that it did not know the persons involved in the first act of participation but stated that "it *would* have been with one or more of the persons identified" in various lists. The information furnished gave absolutely no hint as to any events or incidents that the government was going to attempt to prove and was virtually useless as an aid in preparing for trial.

The intended trial exhibits consisted of over 2700 exhibits, the bulk of which were unrelated telephone records and pricing records. The pricing records covered thousands upon thousands of price changes that were made at petitioners' stations over the period of time covered by the indictment.[6] None of these exhibits gave any specificity as to what was the nature and cause of the accusation. The only exhibits that would have informed petitioners that the nature and cause of the charge of price fixing were the local price changes were the exhibits introduced at trial that related the phone records to the pricing records for the individual markets at a specific point in time. These exhibits were introduced into evidence, *but they were not turned over to the petitioners before trial as* the prosecutor had promised. Yet, this promise was what the trial court relied upon in denying petitioners' request for specific particulars. Interestingly, the exhibits that related the phone records and price records for the three area-wide price changes were turned over to the petitioners prior to trial.

In stating that these materials satisfied the sixth amendment's guarantee that the accused be informed of the nature and cause of the accusation, the government is actually contending that the sixth amendment requires no more than that the government provide a haystack and the accused must conduct a search to find the needle. Moreover, in this case, given the prosecutor's pretrial remarks, petitioners were instructed not to search through the haystack for the needle that the prosecutor eventually used to stick them.

[6] Furthermore, the exhibits that were designated did not serve as a reliable guide to incidents the government intended to prove. For example, GX 38 was designated prior to trial as a proposed exhibit. They were Kayo price cards for two stations in Erie, Pennsylvania. They were not, however, offered into evidence and no evidence was adduced with regard to Erie. Thus, any investigations the defendants might have undertaken were wasted and unproductive.

As noted in petitioners' brief, there was no evidence below of an express agreement among the petitioners to fix prices. Instead, the government contended that the illegal agreement could be inferred from the contact among the petitioners at the time of price changes. As this was the government's case, it was critical for the defense to determine which prices were allegedly fixed, as these prices were the nature and cause of the accusation. The petitioners knew before trial that the three area wide moves were the nature and cause of the accusation and were able to prepare a defense to the charge. When the prosecutor shifted to price changes confined to local markets within the MAS, petitioners were caught unaware because of the prosecutor's pretrial assurances. Because petitioners were not informed that these local price changes were the nature and cause of the accusation, the Court should grant certiorari to reaffirm the application of the sixth amendment to criminal antitrust prosecutions.

Respectfully submitted,

WILBUR D. PRESTON, JR.,
Counsel of Record

NEVETT STEELE, JR.
GERSON B. MEHLMAN
WHITEFORD, TAYLOR, PRESTON,
TRIMBLE & JOHNSTON
2000 First Maryland Building
25 South Charles Street
Baltimore, Maryland 21201
(301) 752-0987
Counsel for Kayo Oil Company

SEYMOUR KURLAND
BARRY F. SCHWARTZ
WOLF, BLOCK, SCHORR & SOLIS-COHEN
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102
(215) 569-4000
Counsel for Meadville Corporation

DAVID F. ALBRIGHT
SEMMES, BOWEN & SEMMES
10 Light Street
Baltimore, Maryland 21202
(301) 539-5040
Counsel for Petroleum
Marketing Corporation

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594